FOLIN & BROTHERS SDN BHD

v.

WONG FOH LING & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[SUIT NO: D4-22-1464-1990]
31 JANUARY 2001

CIVIL PROCEDURE: *Pleadings - Striking out defence - Whether there was non-compliance with order of court*

CIVIL PROCEDURE: *Time - Extension of time - Extension of time to comply with order of court - Whether valid reasons given - Whether prejudice to opposite party*

By an order of the court dated 9 June 1999 ('said order'), the defendants were required within thirty days thereof to serve the plaintiff their respective lists of documents and affidavits verifying lists of documents. Subsequently, three applications were made before the senior assistant registrar ('SAR') in encl. 107, 109 and 112. In encl. 107, the plaintiff applied to strike out the defences of the second, third, fifth, sixth, seventh, eight, ninth, tenth and eleven defendants on the grounds that the said defendants failed to comply with the said order. In encl. 109, the second, third, fifth, sixth, eight, ninth, and eleven defendants applied for an extension of time under O. 3 r. 5(1) of the Rules of the High Court 1980 to serve their affidavits verifying list of documents to the plaintiff. A similar application was made by the seventh defendant in encl. 112. The SAR dismissed the plaintiff's application in encl. 107 and allowed the defendant's applications in encls. 109 and 112. The plaintiff now appealed.

Held:

[1] All the evidence showed that the list of documents and the affidavits verifying the list of documents were before the SAR on the hearing of encl. 107. The discovery which the plaintiff sought had already been provided for even before the said hearing. Thus, the defendants had complied with the said order. Further, the plaintiff's application in encl. 107 under O. 24 r. 16(1) RHC was misconceived as the said order was made pursuant to O. 25 RHC.

[2] In relation to encl. 109, it was acknowledged that there was a delay in filing the documents concerned. The summons for directions was taken out eight years after the suit had commenced and after various stages of interlocutory applications had been made in the present suit and in several other related actions. Apart from that, there were other suits and contempt proceedings involving the plaintiff and the defendants which had to be consolidated and coordinated with the present suit. The explanations advanced for the delay were satisfactory and reasonable. The delay did not substantially affect the fair trial of the present suit and consequently the SAR was right in allowing encl. 109.

[3] In relation to encl. 112, the plaintiff exhibited a letter from the seventh defendant's solicitors and argued that the defendant had been ready with the documents for the list and consequently did not really require time to file and serve the list. That letter was dated six and a half years before the said order. In that span of time, numerous documents had been accumulated and those documents of varying degrees and magnitude needed to be sorted out. The plaintiff had not shown how it had been prejudiced or disadvantaged and justice of the matter favoured the seventh defendant.

[4] In practice, an application to extend time is generally allowed provided no injustice or prejudice has been caused and especially if the other party can be compensated by costs. However, there must always be cogent explanations to satisfactorily explain the delay before the court can exercise its discretion to extend time.

[Appeal dismissed.]

Case(s) referred to:

Attwood v. Chichester [1878] 3 QBD 723 ***(refd)***
Australasian Automatic, etc, Co v. Walter [1891] WN 170 ***(refd)***
B v. B [1978] Fam 181 ***(refd)***
Birkett v. James [1978] AC 297 ***(refd)***
British Leyland Motor Corp Ltd v. Wyatt Interpart Co Ltd [1979] FSR 39 ***(refd)***
Chipchase v. Rosewood [1965] 1 All ER 145 ***(refd)***
Compagnie Financiere du Pacifique v. Peruvian Guano Co [1882] 11 QBD 55 ***(refd)***
Davies v. Eli Lilly & Co [1987] 1 All ER 801 ***(refd)***
Eaton v. Storer [1882] 22 Ch D 92 ***(refd)***
Folin & Brothers Sdn Bhd (In Liquidation) v. Wong Foh Ling & Wong Swee Lin & Ors [2001] 1 CLJ 604 ***(refd)***
Forshaw v. Lewis [1855] 10 Exch 712 ***(refd)***
Grand Metropolitan Nominee (No 2) Co Ltd v. Evans [1992] 1 WLR 1191 ***(refd)***
Ho Shee Jan v. Stephens Properties Sdn Bhd [1986] 2 MLJ 43 ***(foll)***
Husband's of Marchwood Ltd v. Drummond Walker Developments Ltd [1975] 2 All ER 30 ***(refd)***

Hytec Information Systems Ltd v. Coventry City Council [1997] 1 WLR 1666 ***(refd)***
In re Jokai Tea Holdings Ltd (Note) [1992] 1 WLR 1196 ***(refd)***
Keymer v. Reddy [1912] 1 KB 221 ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(refd)***
Lonrho Ltd v. Shell Petroleum Ltd, [1980] 1 WLR 627 ***(refd)***
Lori Malaysia Berhad (Interim Receiver) v. Arab-Malaysian Finance Berhad [1999] 2 CLJ 997 ***(refd)***
Myers v. Elman [1940] AC 282 ***(refd)***
Philipps v. Philipps [1870] 40 LT 815 ***(refd)***
Pole-Carew v. Western Counties Manure Co Ltd [1919] 89 LJ Ch 100 ***(refd)***
R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 WLR 362 ***(refd)***
Radio Corp of America v. Rauland Corp [1956] 1 QB 618 ***(refd)***
Revici v. Prentice Hall Inc [1969] 1 WLR 157 ***(refd)***
Saunders v. Pawley [1885] 14 QBD 234 ***(refd)***
Schafer v. Blyth [1920] 3 KB 143 ***(refd)***
Star News Shops Ltd v. Stafford Refrigeration Ltd (UPO (UK) Ltd and Another, Third Parties; L'Unite Hermetique SA, Fourth Party) [1998] 4 All ER 408 ***(refd)***
Williams Aviation Pty Ltd v. Santos Ltd [1985] 30 SASR 272 ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 3 r. 5(1), O. 24 rr. 2(1), 3, 7, 16(1), O. 25 r. 1

Other source(s) referred to:
Discovery, Paul Matthews & Hodge M Malek, Sweet and Maxwell, 1992, pp 103, 104, 105, 239
Halsbury's Laws of England, 4th edn, vol 12, para 39
*The Supreme Court Practic*e, 1997, London Sweet & Maxwell 1996, vol 1, part 1, p. 446
The Supreme Court Practice, 1999, p 483

For the plaintiff - David Mathews (Ding See Hock & Joseph Yeo with him); M/s D Mathews
For the 2nd, 3rd, 5th, 6th, 8th to 11th defendants - Robert Lazar; M/s Shearn Delamore & Co
For the 7th defendant - Christopher KF Foo; M/s Raja Darryl & Loh

Reported by Raja Vishnu

JUDGMENT

Abdul Malik Ishak J:

To The Heart Of The Matter

This was an offshoot of a previous judgment *vide Folin & Brothers Sdn Bhd (In Liquidation) v. Wong Foh Ling & Wong Swee Lin & Ors* [2001] 1 CLJ 604 which took off on the direction of the Honourable Chief Judge of Malaya

and it was focussed entirely on encl. 123 which was in the form of an appeal to the judge in chambers filed by the plaintiff on 6 July 2000 against the decision of the learned senior assistant registrar ("SAR") that was handed down on 6 July 2000. The learned SAR heard three enclosures simultaneously, namely, encls 107, 109 and 112 on 8 May 2000, 9 June 2000, 5 July 2000 and on 6 July 2000 she delivered her decision wherein she:

(1) dismissed the plaintiff's application in encl. 107 with costs;

(2) allowed Wong Boon Sun (the second defendant), Alice Wong Nee Chan Poh Suan (the third defendant), All Consult (M) Sdn Bhd (the fifth defendant), Folin Technologies (M) Sdn Bhd (the sixth defendant), Peat Marwick Mitchell & Co (didakwa sebagai sebuah firma) (the eighth defendant), KPMG Peat Marwick (didakwa sebagai sebuah firma) (the ninth defendant), Geh Cheng Hooi (the tenth defendant), and Ramli bin Ibrahim (the eleventh defendant) combined application in encl. 109 with costs to the plaintiff; and

(3) allowed Standard Chartered Bank – the seventh defendant's application in encl. 112 with costs to the plaintiff.

The present suit was maintained on behalf of the plaintiff by its joint liquidators in the persons of Ng Pyak Yeow and Khoo Peng Lai who were jointly appointed pursuant to an order of the court dated 13 March 1997 in the winding up actions.

Briefly, encl. 107 was the plaintiff's application by way of a summons in chambers dated 28 January 2000 to strike out the second, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defendants' defence and for judgment to be entered against them under O. 24 r. 16(1) of the Rules of the High Court, 1980 ("RHC"). While encl. 109 was an application of the second, third, fifth, sixth, eighth, ninth, tenth and eleventh defendants' by way of a summons-in-chambers dated 30 March 2000 for an extension of time to serve their affidavit verifying list of documents under O. 3 r. 5(1) of the RHC. Enclosure 112, on the other hand, was an application of Standard Chartered Bank – the seventh defendant's application by way of a summons-in-chambers dated 5 May 2000 for an extension of time to file and serve their affidavit verifying list of documents under O. 3 r. 5(1) of the RHC.

Several affidavits were filed in support of the three enclosures. The plaintiff affirmed affidavits through Ng Pyak Yeow on 27 January 2000 as seen in encl. 106, on 25 April 2000 as seen in encl. 110, on 4 May 2000 as seen in encl. 120 and on 7 August 2000 as seen in encl. 127. Khoo Peng Lai also affirmed two affidavits on behalf of the plaintiff on 23 May 2000 as seen in encl. 108 and on 2 June 2000 as seen in encl. 122.

The second, third, fifth, sixth, eighth to eleventh defendants affirmed affidavits through Robert Lazar on 30 March 2000 as seen in encl. 109A and through Yap Thong Mei on 19 May 2000 as seen in encl. 121.

Standard Chartered Bank, being the seventh defendant, affirmed two affidavits through Christopher Foo on 5 May 2000 as reflected in encls. 111 and 113.

Before proceeding any further, it would be ideal to reproduce O. 24 r. 16(1) of the RHC and I will do so now:

> If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose fails to comply with any provision of that rule or with that order, as the case may be, then without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1), the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.

and it is in the nature of an application to dismiss the action or to strike out the defence, as the case may be, unless the opposite party complies with the rule or order for discovery by the court. Now, what was the order of the court that prompted the plaintiff to proceed under O. 24 r. 16(1) of the RHC? That order was none other than the order of the court dated 9 June 1999 as seen in encl. 87 which was formulated under O. 25 of the RHC wherein, *inter alia*, all the defendants were required within 30 days to serve to the plaintiff their respective lists of documents and affidavits verifying lists of documents. Was the order of the court dated 9 June 1999 in the nature of an "unless" order? In my considered view, it was not. To me an "unless" order would spell out the consequences of the failure to comply with its terms, and any disobedience to such an order is likely to be held to be contumelious behaviour which would result in the dismissal of the action or the striking out of the defence and in the event it gives rise to a dismissal of the action, it may prevent the plaintiff from issuing a second writ even though the period of limitation has not expired. Ward LJ in *Hytec Information Systems Ltd v. Coventry City Council* [1997] 1 WLR 1666, 1674 spoke of the "unless" order in these fine words:

> (1) An unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders. It is the party's last chance to put his case in order. (2) Because that was his last chance, a failure to comply will ordinarily result in the sanction being imposed. (3) This sanction is a necessary forensic weapon which the broader interests of the administration of justice require to be deployed unless the most compelling reason is advanced to exempt his failure. (4) It seems axiomatic that if a party intentionally or deliberately (if the synonym is

> preferred) flouts the order then he can expect no mercy. (5) A sufficient exoneration will almost inevitably require that he satisfies the order that something beyond his control has caused his failure to comply with the order. (6) The judge exercises his judicial discretion in deciding whether or not to excuse. A discretion judicially exercised on the facts and circumstances of each case on its own merits depends on the circumstances of that case; at the core is service to justice. (7) The interests of justice require that justice be shown to the injured party for the procedural inefficiencies caused by the twin scourges of delay and wasted costs. The public interest in the administration of justice to contain those two blights upon it also weighs very heavily. Any injustice to the defaulting party, though never to be ignored, comes a long way behind the other two.

I repeat the order of the court dated 9 June 1999 was not in the nature of an "unless" order. Even if it was in the nature of an "unless" order, the court has the inherent power nay the discretion to ascertain whether the failure to comply with the "unless" order was indeed "intentional and contumelious". If authority is needed for this sound approach, I can do no better than to rely on the speech of Sir Nicolas Browne-Wilkinson VC in the case of *In re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196, CA where at p. 1203A-B, the Vice-Chancellor succinctly said:

> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an 'unless' order, the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed.

Since the order of the court dated 9 June 1999 was a "bare" order following closely the summons-for-directions routine under O. 25 r. 1 of the RHC, this court would certainly look with askance at the application in encl. 107. There was no basis at all for the plaintiff to strike out the defences of the second, third, fifth, sixth, seventh, eighth to the eleventh defendants nor was there a basis for judgment to be entered against them under O. 24 r. 16(1) of the RHC. It was a grave error in procedure when the plaintiff filed encl. 107 purportedly on the strength of the order of the court dated 9 June 1999. There was no provision at all in the order of 9 June 1999 as to what should occur in the event of a default – that order was not in the nature of an "unless" order. In *Star News Shops Ltd v. Stafford Refrigeration Ltd (UPO (UK) Ltd*

and another, third parties; L'Unite Hermetique SA, fourth party) [1998] 4 All ER 408, Otton LJ speaking for the Court of Appeal had this to say at p. 414 of the report:

> In reaching my conclusion I start inevitably with the precise terms of the order of 23 August. This merely required that the fourth party should within 14 days make and file an affidavit stating whether the documents referred to in the schedule are or have been in their possession, custody and power etc. There was no provision as to what should occur in the event of default.

Continuing at the same page, Otton LJ quoted with approval the decision of Russell LJ in *Husband's of Marchwood Ltd v. Drummond Walker Developments Ltd* [1975] 2 All ER 30 at 32, [1975] 1 WLR 603 at 606:

> … what should have been done … was for the plaintiff to ask for an order striking out the defence unless within a certain time the defendants had produced their discovery: and I think, that not having done then, an order which puts them in the situation later of having to produce the whole of the plaintiffs' claim, *albeit* only into court, when they have ultimately complied with the last requirement, is an order which should not have been made.

Later on, his Lordship Otton LJ in the same case rounded up the matter when he aptly said at p. 415 of the report:

> With respect to the learned judge I consider that he did not correctly apply the reasoning of the Court of Appeal. The effect of the order was to debar the fourth party from advancing an arguable defence and left it vulnerable to the outcome of the main action and the third party proceedings. To do so, in my view, was a misuse of the power within Ord 24, r 16(1). The order he made did not secure compliance relating to discovery but punished the fourth party for not having complied with a 'bare' order within the time limited.

In my judgment, on perusal of the court order dated 9 June 1999, I cannot treat the second, third, fifth, sixth, seventh, eighth to eleventh defendants to have acted contumeliously and in total and plain defiance of that court order because that court order was not an "unless" order.

I pause here for a moment. I will now reproduce O. 3 r. 5(1) of the RHC:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules or by any judgment, order or direction, to do any act in any proceedings.

and I have this to say. In interlocutory proceedings, the courts have an inherent jurisdiction to extend or abridge time (*Keymer v. Reddy* [1912] 1 KB 221, CA and *Pole-Carew v. Western Counties Manure Co Ltd* [1919] 89 LJ Ch 100, CA). And this flexible rule is even extended to a situation where the

court has fixed a period of time to do a certain act in a certain way (*Australasian Automatic, etc, Co v. Walter* [1891] WN 170). The philosophy behind the rule is simply to give the court a complete discretion to extend time with a view to do justice and to avoid injustice to the parties (*Schafer v. Blyth* [1920] 3 KB 143; and *Saunders v. Pawley* [1885] 14 QBD 234, 237). Bramwell LJ in *Attwood v. Chichester* [1878] 3 QBD 723 gave a very good guideline to determine extension or abridgement of time and this was what his Lordship said:

> When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs.

According to Jessel MR in *Eaton v. Storer* [1882] 22 Ch D 92 CA an excessive delay may induce a court in exercising its discretion to refuse to extend the time. But if the delay is explained, an extension would be granted especially when that delay could be compensated by costs and that no injustice would be done to the opposite party (*Revici v. Prentice Hall Inc* [1969] 1 WLR 157, [1969] 1 All ER 772, CA). Generally speaking, a very wide inherent jurisdiction is afforded to the court to enlarge time (*R v. Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd* [1976] 1 WLR 362, [1976] 1 All ER 897, CA).

The Involvement Of Messrs Shearn Delamore & Co., As Solicitors For The Second, Third, Fifth, Sixth, Eighth To Eleventh Defendants

The plaintiff through Messrs D. Mathews took exception to Messrs Shearn Delamore & Co., representing those defendants as itemised above. It was the stand of the plaintiff that Messrs Shearn Delamore & Co., acted in a position of conflict and that it had breached solicitor-client relationship. Indeed this was a serious allegation and Messrs Shearn Delamore & Co., took up a cudgel and strenuously argued to the contrary. The plaintiff sought to justify their stand and pointed out the following facts as perceived by them:

(1) It was said that long before the dispute arose between the parties, Messrs Shearn Delamore & Co., had been the plaintiff's solicitors.

(2) That Standard Chartered Bank – the seventh defendant, issued demands to the plaintiff for the repayment of monies purportedly owed by the plaintiff under the banking facilities granted by the said bank. The plaintiff sought advice from Messrs Shearn Delamore & Co., on the matter and instructions were extended and obtained and, consequently, Messrs Shearn

Delamore & Co., responded to Standard Chartered Bank in regard to the demands for the said debt.

(3) That the debt and the securities that were created to secure the banking facilities are currently challenged and are the subject matter in the present suit wherein it was alleged, *inter alia*, that Standard Chartered Bank had unlawfully conspired with the second, third, fifth, sixth, eighth to eleventh defendants to unlawfully create and/or cause the said debt to be increased unduly.

(4) It was said that the plaintiff was indeed aggrieved because Messrs Shearn Delamore & Co., having acted for the plaintiff in respect to the purported debt that was said to be due to Standard Chartered Bank, should not now act against the plaintiff in respect of the plaintiff's claims against the second, third, fifth, sixth, eighth to eleventh defendants pertaining to the unlawful creation or increase of the said debt.

(5) It was said that upon discovery of these unsavoury facts, the joint liquidators alluded to earlier had written to Messrs Shearn Delamore & Co., asking them to forthwith cease to act against the plaintiff and also to return all the plaintiff's documents. Alas, so it was said, despite numerous reminders Messrs Shearn Delamore & Co., played possum and had not responded.

(6) It was said that the joint liquidators were seeking advice on the matter and pending any possible action they reserve their rights and that of the plaintiff to proceed against Messrs Shearn Delamore & Co.

Mr. Robert Lazar responded. Apart from acting for the second, third, fifth, sixth, eighth to eleventh defendants, he was and still is one of the partners of Messrs Shearn Delamore & Co. In regard to the unfair advantage which the plaintiff had alluded to, he pointed out that the plaintiff's submissions through Mr. Joseph Yeo and Mr. David Mathews, were off-tangent and should be ignored because at no time did the joint liquidators request Messrs Shearn Delamore & Co., to cease acting against the plaintiff. Mr. Robert Lazar also submitted that it was erroneous to submit that the allegations made in regard to this issue had not been responded. He drew my attention to encl. 121 – the affidavit in reply of Yap Thong Mei that was affirmed on 19 May 2000, and he submitted that by virtue of encl. 121, the allegations on this issue had been rebutted and responded upon. He then relied on the passage appearing in the case of *Lori Malaysia Berhad (Interim Receiver) v. Arab-Malaysian Finance Berhad* [1999] 2 CLJ 997, a decision of Edgar Joseph Jr FCJ, and pointed out that in that case the court approached the question of replying to affidavits where inferences were raised in this way (see p. 1008 of the report):

> We would observe that in considering the allegations of illegality, the Judge quite rightly pointed out, that these allegations 'were mere insinuations and innuendos which flew in the face of the documents themselves and the realities of the matter viewed from the perspective of AMFB (the Lender) and their Solicitors'. (See page 42 AR).

I take it that Mr. Robert Lazar was nicely pointing out that the allegations of not having replied to this issue was a mere storm in the teacup. It was to say the least an attempt at putting wool over the eyes of this court, so to speak. But was this really so? Let me examine encl. 121, and I need to reproduce paras. 14 and 15 thereto:

> 14. In response to Ng Pyak Yeow's affidavit affirmed on 4.5.2000, I say that the matters set out therein are wholly irrelevant to the interlocutory applications before this Honourable Court. The fact that I have chosen not to address the issues of facts, should there be any, shall not be construed as an admission for reasons that will (be) submitted (later) on at the hearing of this matter.
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> 15. In any event the plaintiff has not in any way identified the issues raised in this present litigation are connected to the matters that may have been referred to Shearn Delamore & Co.

and according to Mr. Ding See Hock, who acted for the plaintiff, these paragraphs did not reflect that the specific allegations against Messrs Shearn Delamore & Co., have been responded to and that being the case it was unfair, according to Mr. Ding See Hock, for Mr. Robert Lazar to take exception to the plaintiff's exceptions in regard to this issue. In regard to Mr. Robert Lazar's submission that the joint liquidators have never asked Messrs Shearn Delamore & Co., to cease acting against the plaintiff, Mr. Ding See Hock submitted that this was not true. According to Mr. Ding See Hock, if given the opportunity, the plaintiff would be more than prepared to file a further affidavit in order to exhibit a letter dated 7 June 2000 where Messrs Shearn Delamore & Co., were asked to cease acting against the plaintiff. Mr. Robert Lazar responded and it was his submission that the involvement of Messrs Shearn Delamore & Co., in defending the second, third, fifth, sixth, eighth to eleventh defendants was not a relevant issue in adjudicating encl. 123. It was the submission of Mr. Robert Lazar that the letter dated 7 June 2000 that was alluded to by Mr. Ding See Hock has to be read in the context of that letter which was in respect of some documents belonging to the plaintiff that was allegedly to be in the possession of Messrs Shearn Delamore & Co. According to Mr. Robert Lazar, his clients too were prepared to file a further affidavit to rebut Mr. Ding See Hock's submission and in the process thereof to adduce a letter dated 8 May 2000 by the joint liquidators where it will show that they only asked Messrs Shearn Delamore & Co., to cease acting as the

plaintiff's lawyers but made no issue at all in regard to Messrs Shearn Delamore & Co., from acting against the plaintiff. I have deliberated at length on the submissions of the parties in regard to this issue, and I would agree with Mr. Robert Lazar's submissions that the allegation under this issue can never form the basis to strike out the second, third, fifth, sixth, eighth to eleventh defendants' defence nor would it be appropriate for judgment to be entered against them under O. 24 r. 16(1) of the RHC. If the plaintiff has a genuine grievance to advance, the remedy would be by filing a formal application to debar Messrs Shearn Delamore & Co., from acting for the second, third, fifth, sixth, eighth to eleventh defendants and until that formal application is filed and heard, Messrs Shearn Delamore & Co., to remain on record as solicitors for their present clients in the present suit. In adjudicating encl. 123, I must recognise Messrs Shearn Delamore & Co., as solicitors for the second, third, fifth, sixth, eighth to eleventh defendants.

What Were The Prayers Sought For In Encl. 107?

As alluded to earlier, encl. 107 was filed on 28 January 2000 and by that enclosure the plaintiff sought for the following orders:

(a) that the defences of the second, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defendants be struck out pursuant to O. 24 r. 16(1) of the RHC;

(b) that interlocutory judgments be entered against the second, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defendants pursuant to O. 24 r. 16(1) of the RHC;

(c) that a date for assessment of damages be fixed;

(d) that the costs of the action and the application be paid by the second, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defendants to the plaintiff; and

(e) any further order which the court deems fit and reasonable.

The grounds for the plaintiff's application in encl. 107 can be seen in the supporting affidavit of Ng Pyak Yeow which was affirmed on 27 January 2000 as reflected in encl. 106 and, briefly, the grounds may be stated as follows:

(a) that the second, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defendants have failed to comply with the order of the court dated 9 June 1999 relating to the filing and service of their respective lists of documents and affidavits verifying lists of documents and that no order for an extension of time had been obtained by them;

(b) that the delay of the second, third, fifth, sixth, seventh, eighth, ninth, tenth and eleventh defendants in filing and serving their respective lists of documents and affidavits verifying list of documents was inordinate and inexcusable; and

(c) that the delay had prejudiced the plaintiff.

But, factually, it now transpired that the list of documents and the affidavits verifying the list of documents of the eighth to eleventh defendants were filed and served on 30 March 2000 as seen in encl. 116 while the list of documents and the affidavits verifying the list of documents of the second, third, fifth and sixth defendants were filed and served on 11 April 2000 as seen in encl. 118. While the seventh defendant – Standard Chartered Bank, filed and served its list of documents and the affidavit verifying the list of documents on 7 March 2000. All these events crucially showed that the list of documents and the affidavits verifying the list of documents were before the learned SAR on the hearing of encl. 107. Thus, when the learned SAR heard encl. 107, the prayers sought for in encl. 107 thereto have become academic since the second, third, fifth, sixth, seventh, eighth to eleventh defendants have complied with the order of the court dated 9 June 1999. In short, the discovery which the plaintiff sought by way of encl. 107 had been provided for even before the hearing of encl. 107. It was thus not surprising that the learned SAR had dismissed the plaintiff's application in encl. 107 with costs and, I too would do likewise. There was no question of the list of documents and the affidavits verifying the list of documents being due and outstanding as they had been filed and served on the plaintiff pursuant to the order of the court dated 9 June 1999 and even before encl. 107 was heard by the learned SAR. In similar vein, Pennycuick J had this to say in *Chipchase v. Rosewood* [1965] 1 All ER 145, 146:

> For some time neither party made or served on the other party a list of documents, until the defendants served theirs on Aug. 5, 1964. The plaintiff had not served one when the present notice of motion was given. The notice of motion is dated Nov. 9; it was received by the plaintiff on Nov. 11, and it comes before me today, Nov. 17.
>
> It is stated by counsel for the plaintiff that, before the date of the notice of motion, a list of documents had been prepared by the plaintiff's solicitors, but that, through some oversight, the list was not sent. Be that as it may, a list was not delivered until yesterday, Nov. 16. The list having been delivered, there is no question today of it still being outstanding; and again, it is not contended by counsel on behalf of the defendants that it would be right to bring the action to an end by reason of this default.

Textbook writers by the name of Paul Matthews and Hodge M Malek in a book entitled *"Discovery"*, a Sweet and Maxwell publication of 1992, echoed the same sentiments at p. 241 thereto:

> In the event that the discovery sought is provided prior to the hearing of the application, the Court will generally decline to strike out the claim or defence as the object of the application would have been achieved.

At any rate it would be pertinent to note that the plaintiff's application in encl. 107 under O. 24 r. 16(1) of the RHC was misconceived. The plaintiff submitted and held onto the notion that the order of the court dated 9 June 1999 was made pursuant to O. 24 r. 3 of the RHC and, with respect, this was completely erroneous and misleading. Order 24 of the RHC generally provides for discovery and inspection of documents whereas a perusal of the order of the court dated 9 June 1999 as seen in encl. 87 showed that that order was made pursuant to the summons for directions which was taken out under O. 25 of the RHC. Thus, the plaintiff fell in error when it relied on the order of the court dated 9 June 1999 in order to make an application in encl. 107 under O. 24 r. 16(1) of the RHC.

An interesting allegation surfaced in the affidavit of Khoo Peng Lai that was affirmed on 23 May 2000 as seen in encl. 108 and that affidavit was affirmed on behalf of the plaintiff. Surprisingly that affidavit alleged that the seventh defendant – Standard Chartered Bank, had suppressed or concealed documents and had not made full discovery in its list of documents. In appraising this affidavit, one must not lose sight of the prayers that were sought for in encl. 107 which principally revolved on the alleged failure to comply with the order of the court dated 9 June 1999, the alleged delay in the filing of the list of documents and the affidavits verifying the list of documents, and the alleged prejudice occasioned to the plaintiff as a result of such delay. Mr. Christopher Foo for the seventh defendant, in style, submitted that the plaintiff cannot change nor add colour to its declared basis in encl. 107 in mid-stream. It was submitted that when the plaintiff subsequently alleged suppression or concealment of documents and an alleged incomplete discovery, the plaintiff was in fact "blowing hot and cold" since the basic ground advanced by the plaintiff when filing encl. 107 was simply that the seventh defendant – Standard Chartered Bank, had not yet filed its list of documents in breach of the order of the court dated 9 June 1999. Indeed these are thought provoking submissions. If there was in fact suppression or concealment of documents or incomplete discovery as alleged by the plaintiff, the best course of action for the plaintiff to adopt would be by resorting to O. 24 r. 7 of the RHC – a provision which deals with discovery of particular documents and that provision is worded as follows:

(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause or matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 2 or 3.

(3) An application for an order under this rule must be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified in the application and that it relates to one or more of the matters in question in the cause or matter.

This is the procedure which the plaintiff should resort to. *The Supreme Court Practic*e, vol. 1, part 1, 1997 – a London Sweet & Maxwell 1996 publication at p. 446 contains a good write up on O. 24 r. 7 of the RHC and there it states lucidly as follows:

> See too *Berkeley Administration v. McClelland* [1990] F.S.R. 381 where at page 382 the court restated the principles as follows: (1) There is no jurisdiction to make an order under R.S.C. Order 24, rule 7, for the production of documents unless (a) there is sufficient evidence that the documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party. (2) When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure. (3) The order must identify with precision the document or documents or categories of document which are required to be disclosed, for otherwise the person making the list may find himself in serious trouble for swearing to a false affidavit, even though doing his best to give an honest disclosure.

But the judicial discretion is not only confined to the question of whether the discovery should be granted but it also extends to the breadth of the discovery. To me, general discovery will be inappropriate because the procedure sets forth in O. 24 r. 7 of the RHC must not be used nor adopted for any "fishing expedition." Discovery will not be acceded to when it is solely to enable a party to frame a new case nor would discovery be ordered for the purpose of fishing for evidence (*Philipps v. Philipps* [1870] 40 LT 815 at 819; *Radio Corp of America v. Rauland Corp.* [1956] 1 QB 618 at 649; and *British*

Leyland Motor Corp. Ltd v. Wyatt Interpart Co. Ltd [1979] FSR 39). Brett LJ in *Compagnie Financiere du Pacifique v. Peruvian Guano Co.* [1882] 11 QBD 55 at 63 advanced a classic test of relevance in these fine words:

> It seems to me that every document relates to the matters in question in the action, which not only would be in evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words 'either directly or indirectly' because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences.

According to the case of *Williams Aviation Pty Ltd v. Santos Ltd* [1985] 30 SASR 272, there is a requirement that there be "a degree of generality in the description of the documents (which) might according to the circumstances be compatible with reasonableness." It is for this reason that an affidavit in support of an application for discovery must be affirmed "stating the belief that the party from whom discovery is sought" has "in his possession, custody or power of the document, or class of document" specified therein.

Discovery of documents is a process enshrined in our RHC where the parties are able to obtain from each other a list of all documents relevant to the proceedings which are in the possession, custody or power of the party making the discovery. A party making discovery must make available for inspection by the other party all documents germane to the occasion except those documents wherein valid objections to production is properly made and alluded to. The whole process of discovery is subject to the control of the court. This is purely to enable the court, in its sole discretion, to determine matters in regard to the validity of objection as to the production of documents for inspection and at the same time to enforce the party to make the necessary disclosure and inspection thereto. Effectively applied and appropriately used, discovery is the surest way to appraise the strengths or weaknesses of the opponent's case. Donaldson MR in *Davies v. Eli Lilly & Co* [1987] 1 All ER 801 sets out the rationale for discovery in these salient words:

> The right (to discovery) is peculiar to the common law jurisdiction. In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. `Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties, and, if the court does not have all the relevant information, it cannot achieve this object.

The duty of a solicitor in the discovery process is very onerous. In *Myers v. Elman* [1940] AC 282, the House of Lords held that the solicitor in that case to be guilty of professional misconduct for allowing an affidavit of documents to be sworn by his client when that solicitor knew it to be wrong and misleading.

The affidavit of discovery must be exhaustive and comprehensive. It must itemise and describe all the documents that are or have been in the opposite party's possession, custody and power. It is a demand which is all encompassing, throwing its net wider and it calls for candour: frankness would be the touchstone for the affidavit of discovery. Once a document is disclosed, it does not mean that it will later be subject to production (*Forshaw v. Lewis* [1855] 10 Exch 712, 156 ER 626). *Halsbury's Laws of England* (4th edn), vol. 12, at para. 39 defines "possession" to mean "the physical or corporeal holding of the document pursuant to a legal right to its possession … " ; while "custody" is defined as "the mere actual physical or corporeal holding of a document, regardless of its right to possession" ; and the term "power" "means an enforceable right to inspect the document or to obtain possession or control of it from the person who ordinarily has it in fact." In a book entitled *"Discovery"* by Paul Matthews and Hodge M. Malek, the learned authors at p. 103 commented:

> Note that 'the requirements of the Rules are disjunctive in their operation so far as possession, custody and power are concerned (*B. v . B.* [1978] Fam. 181 at 186),' *ie*, only one limb needs to be satisfied for the obligation to attach.

At p. 104 of the same book, the learned authors relied on the case of *B. v. B.* [1978] Fam. 181 at 186 and that case was reproduced as follows:

> In *B. v. B.*, Dunn J. said:
>
> > Before 1964 the word 'possession' was held to mean 'corporeal possession pursuant to legal possession,' but 'corporeal possession' is now embraced by the word 'custody'.

At p. 105 of the same book, the learned authors said:

> In *B. v. B.*, Dunn J. said:
>
> > 'custody' means 'the actual physical or corporeal holding of a document regardless of the right to possession, for example a holding of a document by a party as servant or agent of the true owner'."

Continuing at the same page which eventually spills over to p. 106 of the same book, the learned authors had this to say:

In *B. v. B.*, Dunn J. said:

> 'power' means 'an enforceable right to inspect the document or to obtain possession or control of the document from the person who ordinarily has it in fact.'

This view was adopted from *Halsbury's Laws of England*, 4th edn, vol. 13, para. 39, and was itself based on nineteenth century case law. In *Lonrho Ltd v. Shell Petroleum Ltd.*, [1980] 1 WLR 627 at 635, Lord Diplock put it this way:

> ... the expression 'power' must, in my view, mean a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the person entitled to it to obtain immediate inspection would not prevent the document from being within his power … .

Reverting back to the question of the solicitor's obligations, the learned authors of the same book had this to say at p. 245 to p. 246 thereof:

> The solicitor's duty extends to explaining to his client the obligation of discovery and the need to preserve documents. In *Rockwell Machine v. Barrus* [1968] 1 WLR 693 at 694, Megarry J outlined this aspect of the solicitor's duty as follows:
>
> > It seems to me necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after writ issued, not only the duty of discovery and its width, but also the importance of not destroying documents which might by possibility have to be disclosed. This burden extends, in my judgment, to taking steps to ensure that in any corporate organisation knowledge of this burden is passed on to anyone who may be affected by it.
>
> Indeed, a solicitor should not wait until proceedings have been commenced before explaining the obligation of discovery to his client: once litigation is contemplated, the solicitor should advise his client as to his obligations on discovery. In addition, from the client's point of view the very width of the discovery obligation may be a significant factor in the decision whether to become involved in proceedings at all.

These are general principles of law which would come in handy in adjudicating encl. 123.

Reverting back to the allegations of suppression or concealment of documents or incomplete discovery which ran counter to the grounds advanced by the

plaintiff in encl. 107, I need to say that the plaintiff was "raking up another ground" at a late stage and this must not be allowed to pass by without some sanction. Chan J in *Ho Shee Jan v. Stephens Properties Sdn Bhd* [1986] 2 MLJ 43 spoke of "fair play" in the following context which must surely apply to the factual matrix of the present appeal. There his Lordship said at p. 48 of the report:

> The company must be fair in its dealings. This doctrine of fair play is described by Lord Denning M.R. as a doctrine of estoppel by conduct. This is what the Master of the Rolls said in *Panchaud Freres S.A. v. Et. General Grain Co.* [1970] 1 Lloyd's Rep. 53, 56-57.
>
> It is well settled that if a buyer rejects and gives one ground for it, he is not confined to that ground. If he afterwards finds out another ground on which he was entitled to reject, then in the ordinary way he can rely on that ground also. That is clear from *Taylor v. Oakes, Roncoroni & Co.*, [1922] 38 T.L.R. 349. It is similar to the rule that if a man dismisses a servant on one ground, he is not confined to that ground. If he afterwards find another ground justifying his dismissal, he can rely on that too. But this rule is subject to the qualification that a man may by his conduct preclude himself from setting up the later ground. We had, a little while ago, a case where a man was dismissed for one particular piece of dishonesty. At the trial the employer realised that he would not succeed in proving that particular dishonesty. So, during an adjournment, he got evidence of another piece of dishonesty and tried to raise it. But we did not allow it. He had fought the case on the earlier ground, and it would not be fair to allow him to rake up another ground at that stage. It is not, strictly speaking, a case of waiver but of estoppel by conduct.

and certainly the doctrine of estoppel by conduct should be vigorously activated to the detriment of the plaintiff.

The plaintiff did not seek discovery under O. 24 r. 7 of the RHC but merely made the wild allegations as alluded to earlier. This was my judgment and I so hold accordingly.

Enclosure 109

The second, third, fifth, sixth, eighth to eleventh defendants filed an application for an extension of time to file the list of documents pursuant to O. 3 r. 5(1) of the RHC. The order of the court dated 9 June 1999 had ordered the parties to the suit to serve on each other a list of their documents and to file an affidavit verifying that list. It was acknowledged that there was delay in filing those documents. The reasons for the delay were manifold. It must be emphasised that the summons for directions was taken out some eight years after the suit had commenced and after various stages of interlocutory

applications have been made in the present suit and in several other related actions. In view of all these interlocutory applications, the parties grew to accept on the basis of their conduct to each other that they will not insist on the strict time limit that should be adhered to in relation to the several interlocutory processes. There are three other suits which are relevant to the present suit and they are:

(1) Kuala Lumpur High Court Suit No: D3-22-578-92 is an action instituted by Folin Food Processing Sdn Bhd, a subsidiary of the present plaintiff against the same defendants.

(2) Kuala Lumpur High Court Suit No: S7-24-(31)-343-88 is a foreclosure action instituted by the seventh defendant – Standard Chartered Bank, against the present plaintiff.

(3) Shah Alam High Court Suit No: 22-76-1991 sees the plaintiff in the present suit becoming the defendant.

and these three suits have been ordered by Yaakob Ismail J to be consolidated with the present suit.

Apart from the above mentioned suits, the first and the tenth defendants together with several other partners and employees of the eighth and ninth defendants were facing contempt proceedings in Companies Winding Up Suit No: 66 of 1980. It must be emphasised that the present suit had, out of necessity, to be coordinated with the contempt proceedings as the events that gave rise to the alleged contempt formed part and parcel of the background to the present suit. Due to the complexity of the various actions being heard together, the parties agreed that the time limits for the compliance of the procedural rules in relation to the discovery and inspections of documents be relaxed for so long as the matter could be taken to trial. It was for these reasons that the plaintiff did not abide by the order of the court dated 9 June 1999 and in agreement with the defendants the plaintiff too sought for extensions of time. The plaintiff was also lulled into inactivity and the plaintiff only filed their list of documents on 26 December 1999. Partial directions were then given on the hearing of the summons for directions. From time to time, the summons for directions were then adjourned and on the last hearing date which was on 27 December 1999, the matter somehow was not listed for hearing and to date the summons for directions has yet to be restored for hearing. It would be apparent that both the parties have had the benefit of taking reasonable time to file the list of documents and no exact time limits were stipulated.

It would be opportune to reproduce the order of the court dated 9 June 1999 in its original text. The court order was worded thus:

1. Plaintif dalam masa 30 hari menyampaikan kepada Defendan suatu senarai dokumen dan memfailkan suatu Afidavit menentusahkan senarai itu;

2. Defendan dalam masa 30 hari menyampaikan kepada Plaintif suatu senarai dokumen dan memfailkan suatu Afidavit menentusahkan senarai itu;

3. Pemeriksaan dokumen-dokumen akan diadakan dalam masa 60 hari selepas penyampaian senarai-senarai itu.

and it must be construed following the guideline of what Paul Matthews and Hodge M. Malek said in their book entitled "*Discovery*", a *Sweet and Maxwell* publication of 1992, at p. 239 thereto that the:

> R.S.C., Ord. 24, r. 16(1) C.C.R., Ord.14, r. 10(1) is designed to secure compliance with the Rules and orders of the court relating to discovery, and not to punish a party for not having complied with them in the time limited for the purpose.

but, in the present appeal although there was delay in filing those documents yet those documents were eventually filed and this meant that the order of the court dated 9 June 1999 had been complied with. It must be emphasised that the court order was neither a final order nor an "unless" order.

Was there really an inordinate and inexcusable delay in complying with the court order dated 9 June 1999? The case of *Birkett v. James* [1978] AC 297 at 318, [1977] 3 WLR 38, [1977] 2 All ER 801 HL laid down, *inter alia*, the following features to determine inordinate and inexcusable delay:

(1) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action;

(2) that such delay is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between themselves and a third party.

It is quite difficult to gauge or ascertain the particulars of "serious prejudice" in the strict sense of the word. Everything would be dependent on the facts of each case and the facts in the present case showed no prejudice sustained by the plaintiff and the plaintiff too had not shown how the filing of the list of documents had prejudiced them.

Next, the plaintiff argued that the second, third, fifth, sixth, eighth to eleventh defendants have been guilty of inordinate delay. Indeed if there was inordinate

delay as argued by the plaintiff, then the next step would be to determine whether cogent explanations have been rendered and whether those explanations were acceptable to this court. It must be recalled that encl. 109 was filed on 30 March 2000 and calculation wise it was three months three days after the expiry of the dateline of 28 December 1999. To recapitulate the excuses advanced by the second, third, fifth, sixth, eighth to eleventh defendants may conveniently be summarised as follows:

(1) that there was an understanding between the parties that there would not be a strict insistence as to the time limits;

(2) that the case was an old vintage case which involved complex issues and the facts dated back to so many years;

(3) that there were in existence other related litigations; and

(4) they were not aware of the deadline.

In my judgment, the explanations advanced were satisfactory and reasonable and acceptable to this court and the delay did not substantially affect the fair trial of the present suit and, consequently, the learned SAR was right in allowing encl. 109 with costs to the plaintiff. It was purely a question of discretion as to whether this court ought to accept the explanations for the delay. As Gopal Sri Ram JCA in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396 aptly puts it (see pp. 401-402 of the report):

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The *maxim vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the Court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
>
> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the judge in whom the law primarily vests the discretion.

In construing the order of the court dated 9 June 1999, the benefit of any doubt that may arise should be accorded to the second, third, fifth, sixth, eighth to eleventh defendants. This line of construction finds support in a passage that appears in *The Supreme Court Practice*, 1999 version at p. 483 where it is stated as follows:

> In approaching an application to dismiss an action on the basis of non-compliance with an order for specific discovery, a court could give the benefit of any doubt in the construction of the order to the plaintiff whose action was facing the prospect of being dismissed (*Triolacan Ltd v. Medway Power Drives Ltd* [1991] The Times, October 21, CA).

and I must vigorously apply it for their benefit. This was my judgment and I so hold accordingly.

Enclosure 112

This was the seventh defendant – the Standard Chartered bank's application for an extension of time to file and serve its list of documents and for an order that the filing and service of its list on 7 March 2000 be deemed valid and proper. The affidavits in support of the application can be seen in encls. 111 and 113 which were affirmed by Christopher Foo on 5 May 2000. In a nutshell, the seventh defendant's grounds for the said application were:

(1) that this was an old vintage case;

(2) that the preparation of the list of documents involved numerous documents which dated back to 1997 and these documents needed to be sorted out, arranged and fine tuned;

(3) that the seventh defendant had intended to request for an extension of time on 28 December 1999 but was prevented from doing so since the matter was not listed for the day in the court schedule;

(4) that the plaintiff would not suffer any disadvantage.

In opposing the application in encl. 112, the plaintiff by way of an affidavit in encl. 108 that was affirmed by Khoo Peng Lai on 23 May 2000 made repeated allegations that the seventh defendant had deliberately tried to delay the matter. The plaintiff exhibited a letter from the seventh defendant's solicitors dated 11 December 1992 marked as exh. "K-1" of encl. 108 in an attempt to show that the seventh defendant had since 11 December 1992 been ready with the documents for the list and, consequently, the seventh defendant did not really require time to file and serve the list. For convenience, the letter dated 11 December 1992 will now be reproduced:

> We refer to your facsimile message of 10 December 1992.
>
> 2. Kindly be informed that the documents sent to you during the discovery stage of OS No: S7-24(31)-343-88 are also all the documents which our clients will be producing at the discovery of the above.

3. We hereby seek your confirmation that there are no other documents related to the above action apart from the documents sent to us during the discovery of OS No: S7-24(31)-343-88.

That letter as reproduced was dated 11 December 1992 and it was some 6 1/2 years before the order of the court dated 9 June 1999. In that span of time, numerous documents had been accumulated and these documents of varying degrees and magnitude needed to be sorted out. As alluded to earlier there were three other suits that were filed in other courts and these suits were linked and inter-related to the present action and care must be exercised to separate the numerous documents to ensure that the correct documents matched the relevant suits and subject matters.

It was the stand of the seventh defendant in so far as the issue of delay was concerned that there was no reason whatsoever to delay the matter deliberately because out of the three suits, the Kuala Lumpur High Court Civil Suit No: S7-24(31)-343-88 has been designated and classified as the "lead suit" where the seventh defendant was the plaintiff while the plaintiff in the present suit was the defendant in that "lead suit". On 15 January 1991, the seventh defendant had set down its "lead suit" for hearing but because the "lead suit" had been ordered to be heard together with the present suit as alluded to earlier, it would be prudent and beneficial for the present suit to be ready for trial with the other suits.

In regard to the issue of prejudice, the plaintiff failed to show how the service and the filing of the seventh defendant's list of documents on 7 March 2000 had prejudiced the plaintiff.

Taking into account the facts and circumstances of the present suit and marshalling those facts with the other three suits that were alluded to earlier, it was part and parcel of my judgment that the plaintiff had not disputed the seventh defendant's assertion that large volume of documents were involved in the preparation of the list of documents and instead the plaintiff had chosen to rely on the letter dated 11 December 1992 which the seventh defendant had sufficiently explained.

I have alluded to O. 3 r. 5(1) of the RHC which expressly empowers the court, on such terms as it thinks just to extend the period within which a person is required by any order to do any act in any proceedings. The learned SAR had acted prudently when she awarded costs to the plaintiff in the course of allowing encl. 112. Costs would certainly compensate the plaintiff for any inconvenience which may have been caused by the delay of slightly over two

months in the filing and serving of the seventh defendant's list of documents. The delay on the part of the seventh defendant was negligible as compared to the plaintiff's delay. It took the plaintiff some nine years to file and serve its own list of documents and this delay was certainly in breach of O. 24 r. 2(1) of the RHC. The plaintiff also took some eight years to file the summons for directions and this was clearly in breach of O. 25 r. 1 of the RHC. In my judgment, it was the plaintiff and not the seventh defendant who was guilty of inordinate delay. It was also my judgment that since the seventh defendant's list of documents had already been served and filed on 7 March 2000 and the plaintiff had not shown how it had been prejudiced or disadvantaged, the justice of the matter must weigh heavily in favour of the seventh defendant. In the circumstances, I must agree with the decision of the learned SAR when she allowed encl. 112 with costs to be extended to the plaintiff.

Whole Gamut Of Allegations

There were allegations of various breaches of fiduciary duties, misappropriation of monies and properties together with conspiracy to effect a fraudulent scheme to defraud and injure. All these allegations would stir one's thought and boost the mind of even the dullest. It would serve as a stimulant to those interested in the law. According to Purchas LJ in *Grand Metropolitan Nominee (No 2) Co Ltd v. Evans* [1992] 1 WLR 1191, 1195 in the context of an "unless" order that:

> In a pleading containing many different issues, it would be a truly draconian step to strike out the whole of an extensive claim with many different facets because of the failure in respect of one or two of the many allegations to comply with an order to give further and better particulars, unless it was to mark the court's displeasure at the deliberate and contumelious conduct of one of the parties.

and although these were said in that context, yet the sage words of his Lordship bear striking resemblance to the facts of the present appeal and this court was entitled to give weight to what his Lordship had said in the context of ascertaining whether the learned SAR in the present appeal had rightly dismissed the plaintiff's application in encl. 107 with costs. I have no hesitation in agreeing with the decision of the learned SAR in this regard.

Conclusion

For the reasons adumbrated above, I dismissed the plaintiff's appeal in encl. 123 with costs and I affirmed forthwith the decisions of the learned SAR when she:

(1) dismissed the plaintiff's application in encl. 107 with costs;

(2) allowed the application in encl. 109 with costs to be awarded to the plaintiff; and

(3) allowed the application in encl. 112 with costs to be awarded to the plaintiff.

Plainly the decision of the learned SAR was impeccable. The facts and circumstances of the present appeal were such that the learned SAR was right in arriving at those decisions. I too made an ancillary order to the effect that the trial of the present suit be expedited subject to the compliance with the rigours of the RHC.